IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 221

HENRY FRIEDMAN,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

STATEMENT.

The appellant, in 1910, made entry of a tract of coal land which lay within fifteen miles of a railroad and embraced 120 acres. The price of the land had been, by the officers of the Department of the Interior, fixed at $50 per acre, and Friedman was obliged to pay, and did pay, at that rate. This fixing and exaction of the price was done in accordance with certain regulations promulgated by the Department on April 12, 1907, by which it was undertaken to alter the original construction of section 2347 Rev. Stat. U. S. and the pre-existing practice thereunder by providing that the price of coal lands, instead of the sums specified in the statute, should be such sums as should be ascertained by classification and appraisement of the lands with reference to their actual value. Afterward, in 1914, Friedman applied to the Secretary of the Interior for repayment of the difference between the price paid, $6,000, and the price of the land at $20 per acre, the sum pre-

scribed by section 2347, such difference being $3,600. This application being denied, the entryman brought suit in the Court of Claims for that sum, his theory being that the regulations mentioned as requiring more than the statutory price were beyond the competency of the Department and the exaction of the excess over $20 was unlawful. The Court of Claims rendered judgment against the claimant; and appeal from that judgment brings the cause to this Court.

ASSIGNMENT OF ERRORS.

It will be submitted that the Court of Claims erred:

1. In rendering judgment for the defendant.
2. In failing to render judgment for $3,600 in favor of the claimant, here appellant.
9. In not holding that the lawful price of the land embraced in the claimant's entry was $20 an acre, and that he was required to pay therefor $30 an acre in excess of the lawful requirements.
4. In not holding that the coal land law fixes a flat rate of $20 an acre for all coal lands within fifteen miles of a completed railroad, and that the Land Department is without authority of law to exact any other or different price for such lands.

ARGUMENT.

The one question presented is whether the price at which entry of coal land may be made is regulated by the statute, section 2347 of the Revised Statute, which authorizes such entries, or whether for such lands the Secretary of the Interior is competent to exact some other and higher price to be fixed by himself in the exercise of his uncontrolled discretion.

The question thus stated, it will be observed, implies the broader question, whether the act providing for the disposal of coal lands is operative *proprio*

vigore, or whether the operation of the statute may be controlled, limited or wholly prevented according to the judgment or the disposition of a single officer.

I.

Section 2347 Rev. St. U. S., exacts that every person possessing certain specified qualifications shall have the right to make entry of an area not exceeding 160 acres of coal land:

> "Upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

If section 2347 Rev. Stat., *supra*, were the first and only statute ever enacted providing for the disposal of public land, a possible ambiguity would be presented by the very singular phraseology used to define the terms of sale.

In that case the provision that coal lands shall be sold for not less than $10 or $20 per acre might be taken to imply that higher prices were contemplated as chargeable in some certain contingencies. Such implication would further imply that the contingencies contemplated are elsewhere ascertained by some other provision. The circumstances which should warrant the exaction of a higher price, and the principles governing the determination of such price, would be, presumably, found either in the same act or in some other *in pari materia* by which the conditions of increased prices should be defined and some standards fixed with reference to which the scale of prices should be regulated. If no such collateral enactment could be found, the natural construction would be that Congress in-

tended that the prices named in the statute should be the only prices, at least for the present and until occasion should appear for adopting other prices by future legislation.

In the absence of any such collateral or subsequent enactment on the subject, it would hardly occur to anybody that the omission to make more definite provision as to prices implies that the whole matter was committed to the discretion of some unnamed and unindicated individual. Since no person, official or unofficial, is designated as an arbiter to determine the conditions appropriate for charging more than the statutory minimum or fix the enhanced prices, the control of this most important element of the legislation is vested in some person or group of persons who must be identified by sheer conjecture or perhaps ascertained by chance. As the section prescribes no principles to regulate the matter and defines no circumstances in which the price may be augmented, it results that the arbiter, when discovered, has nothing to guid. or limit the exercise of his power over prices except his own individual discretion and personal predilections.

Such a result would be decidedly startling to anyone acquainted with the settled course and usual features of previous legislation upon public land matters. Rather than to subject this enactment to a construction so extraordinary, it would be more reasonable and certainly safer to understand the statute as signifying that the prices therein specified should be the only prices chargeable, at any rate until higher prices should be authorized by future legislation.

And so seems the clear weight of authority upon enactments similarly phrased. Certain English statutes prescribing minimum periods for the doing of speci-

fied things have uniformly been held satisfied by performance within the periods limited, the only question ever arising being whether a requirement of at least so many days was fulfilled by counting in the day on which the time commenced to run; and some such provisions have been held to contemplate the intervention of so many full or clear days:

Reg. v. Justices, 8 Ad. & El. 183.
Chambers v. Smith, 12 M. & W. 2.

In none of these cases was it suggested that an allowance of a fixed number of days authorized a court or any one else to presume a greater number; and in the former of the cases just cited, Littledale, J., said, "It appears to me that a day is a day, whether *at least* be added or left out."

So one might observe that ten or twenty dollars is ten or twenty dollars, whether or not it be prescribed that "shall be at least or not less than ten or twenty dollars.

In the Federal courts only one case has been found bearing upon the construction of such phraseology. In Stimpson v. Pond, 2 Curtis, 502, Circuit Judge Curtis was called upon to fix a fine in a case under a penal statute providing that an offender should be fined not less than one hundred dollars. He held that the act gave him no power to impose a larger fine, saying:

> "This is certainly an anomalous provision. After a good deal of reflection, I am of opinion that it does not authorize the infliction of a greater penalty than one hundred dollars. The only power expressly given by this act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a penalty of just one hundred dollars."

In the State Courts there seem to be only two rulings upon the precise point: Hankins v. People, 106 Ill. 30, in which Stimpson v. Pond is disapproved, and it is held that authority to impose a fine of not less than $100 implies discretion to fix a higher penalty; and Worth v. Peck, 7 Pa. St. 268, holding to the same effect.

A distinction which reconciles these authorities, and is also very material to the present question, lies in the fact that the State Courts had inherent authority to fix fines, an authority without limitation save as limited by statute; whereas the Federal Court had no such authority save as the statute gave it. To the other cases which may be cited from the States as holding that a statutory minimum does not limit a power, the same observation applies. Where it is provided that a board of road commissioners shall not lay out a road or build a bridge less than sixteen feet wide, the statute is dealing with a body having in regard to roads and bridges a power which exists before the statute and independently of the limitation; so where the provision is of a minimum period for notices and other action, the authority to give the notice or to take the action is not conferred by the statute, but is inherent in the persons or courts concerned, and the statute only regulates the exercise of a power existing independently of the enactment; as in Rusch v. Davenport, 6 Iowa, 443; Stewart v. Griswold, 134 Mass. 391; Corn v. Brown, 210 Pa. St. 29.

The immediate materiality of this distinction lies in this: the Land Department has no inherent authority to sell public lands or to fix the prices to be charged therefor. The Secretary can not sell an acre without specific warrant of statute; and he can not charge a

dollar except as some statute confers on him power to exact the dollar. In no legislation concerning public lands has any discretion to fix prices been conferred upon, or recognized as existing in, any officer of the Land Department. If the construction now proposed to be put upon the coal land act,—and which the Department has put upon that and some acts of similar tenor—be correct, it implies that by sheer implication and mere silence Congress has vested in the Secretary a power which is not only absolutely arbitrary in nature but essentially at variance with a principle which for more than a hundred years has been recognized as fundamental.

Unless section 2347 limits the prices to be charged to those specified, it must be taken as assuming the existence in some official of a power which is not only without precedent for its exercise but literally unlimited in its extent.

II.

Fortunately we are not reduced to construing section 2347 upon the material supplied by the mere text of the statute. The genesis of the existing enactment amply elucidates any ambiguity in the present mode of expression.

The first provision for the sale of coal lands belonging to the United States was made by an Act of Congress approved on July 1, 1864, 13 Stat. at L. 343, which enacted.

> "That where any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as mines are excluded from the preemption act of 1841, and which under past legislation are not liable to private entry, * * * it shall and may be lawful for the President to

> cause such tracts in suitable legal subdivisions to be offered at public sale to the highest bidder, after public notice of not less than three months, *at a minimum price* of $20 per acre; and any lands not thus disposed of shall thereafter be liable to private entry *at said minimum.*"

By an Act of March 3, 1865, 13 Stat. at L., 529, provision was made for entry of coal land by any citizen of the United States actually engaged in mining on the tract sought to be entered, and it was enacted that such person should be entitled to the land so occupied by him "at the minimum price of $20 an acre fixed in the coal and town property Act of July 1, 1864."

The Act of March 3, 1873, 17 Stat. at L., 607, revised and consolidated the pre-existing legislation on this subject. This act omitted the provision for offering coal lands at auction, and authorized the sale of such lands by private entry, which it was enacted might be made upon payment of not less than $10 or $20 per acre, according to distance from a railroad. This act was in force at the date of the general revision of the statutes in 1874 and was embodied therein as section *2347 et seq.*, Rev. Stat. U. S. Concerning this course of legislation, this Court has said:

> "The language of the preemption act of 1841 is preserved in section 2258 of the Revised Statutes. The act of 1864 and its supplemental act of March 3, 1865, 13 Stat. 529, C. 107, were substantially re-enacted by the Act of March 3, 1873, 17 Stat. 607, C. 273, now embodied in section 2347 of the Revised Statutes and the section immediately following.
>
> "The force and meaning of the original legis-

lation remain unchanged."

Colorado C. & C. Co. v. United States, 123 U. S. 307.

It is clear, then, whence comes the expression *not less than* in section 2347. It is simply the equivalent of the minimum and *minimum price* occurring in the prior legislation from which the revision was derived. Although the form of wording is varied "the force and meaning of the original legislation remain unchanged."

In the Acts of 1864 and 1865, the price of $20 was called the minimum price because in the scheme of selling at auction no sales were to be made for less than that sum, and in the private entry provided for to follow the auction the same price was fixed which had been the minimum at the auction. No doubt, too, the form of expression was influenced by a certain identical use of the same phrase in the analogous cases of selling other public lands, a matter to be mentioned at a later point of this argument. Certainly, the use of this language did not contemplate the augmentation of the prices specified or imply that any official has discretion to exact higher prices at private entry. So long as these statutes remained in force, nobody would have suggested that the mention of $20 as a minimum price imported anything else than a reference to the previous provisions concerning sales at auction; still less would it have occurred to even the most astute interpreter that somebody was authorized or expected to formulate a scale of prices for private entry and to charge more than the sum named as the only statutory price.

To sustain such a construction of the Act of 1873, it must be inferred that the change of expression from

the phrase *minimum price*, used in the prior acts, to the phrase ***not less than*** in the new act, signified a change of legislative intent. As a general principle of statutory interpretation, no such inference is warranted by the mere variation in legislative language; this proposition, it is conceived, requires no citation of cases in this Court. Apart from that, we have what seems to be the considerate interpretation of this Court to the effect that the force and meaning of the original coal land acts were unchanged by the Act of 1873. And so section 2347, as found in the revision was interpreted by Mr. Justice Brewer, then Circuit Judge, in the case of the United States v. the Trinidad Coal Coking Co., 37 Fed. Rep. 180, where he said:

> "And the act of Congress gives a right to purchase to persons possessing certain qualifications upon the payment of a certain amount of money, *the maximum being $20 per acre*, which was paid in this case. So that the parties who entered (the patentees) had the right to purchase, and the Government has received its full pay, *the highest fixed price* for the lands it has conveyed."

The point being apparently determined by these authorities—and it is believed there are none to the contrary—it is supererogatory to argue that the language used in the Act of 1873 did not signify a departure from the scheme and principles prescribed by the original legislation of which that act was a revision. It may, however, be observed that if the Act of 1873 and section 2347 mean what is now contended, it must be supposed that Congress, by a slight verbal alteration—which might be deemed inadvertent if it were not otherwise amply explained—intended a revolution-

ary and most anomalous alteration in the policy of public land administration. Before, no officer had any discretion in fixing the price of such land. By the substitution of three words in the new statute for three words of equivalent import in the old—virtually *sub silentio*—the Secretary of the Interior was invested with an unprecedented and wholly unlimited power over property of unimaginable value, and the whole theory of previous and subsequent legislation was subverted.

III.

Moreover, in comparing section 2347 with other legislation *in pari materia*, we are not limited to statutes bearing upon the sale of coal lands. As section 2347 is only an item in a pre-existing and broader scheme of enactment upon that particular subject, so all the coal land statutes constitute only an element incorporated into a mass of antecedent and much larger legislation on the general subject of public lands. Indeed, as is mentioned in the case of the Colorado Coal Co. v. United States, *supra*, the very first act concerning coal lands referred to a former statute concerning public lands generally, and avows as the reason for special legislation upon coal lands the fact that the pre-existing body of law made other provision for such lands. It is, therefore, not only legitimate, but necessary to a proper understanding of the law affecting coal lands, to read that law with reference to the prior scheme for the disposal of public lands in general.

By the original method of administering the public domain the one thing contemplated was sale. This method as matured in the Act of 1820 continued substantially unchanged—save for the pre-emption and homestead acts and the later legislation for mineral

lands—until the abolition of cash entry by the Act of March 3, 1889. Under the provisions of the Act of 1820 most of the northwest Territory and much of the land beyond the Mississippi was transferred to private ownership.

The essential features of the method adopted in 1820 were:

1. That all public land should be offered at auction.

2. That at the auction the upset or minimum price should be $1.25 per acre.

3. That after the auction all lands offered and remaining unsold should be subject to private sale at $1.25 per acre.

Although the Act of 1820 did not designate $1.25 as the minimum price, or by any other name, that sum was in fact the minimum price at the public auction as it was also the single price and the fixed price at which private entry could be made. It was inevitable that the phrase *minimum price* should be adopted in popular speech to signify the lowest price at which land might be bought at the auction, and also to signify the only price which might be charged upon a purchase by private entry. And, likewise almost inevitably, the same phrase crept into official and finally into legislative language.

At least as early as 1841, that sense of the term *minimum price*, as equivalent to the upset price at public auction and the sale price at private sale, had found its way into the statute-book. By the pre-emption act of that year, it was enacted that the persons described as entitled to pre-emption should have the right to purchase "upon paying to the United States the minimum price of such land:" 5 Stat. at L. 453.

It will be remembered the Act of 1864, the first provision for sale of coal lands, expressly refers to this very act of 1841 as the reason for its own existence. In adopting the phrase used in the pre-emption act, the later enactment plainly adopted the sense in which that phrase was used.

In later legislation Congress has habitually used the same expression to signify $1.25 per acre. Thus in one of the first, perhaps the first, of the grants in aid of railway construction, there is a provision that certain tracts reserved to the United States "shall not be sold for less than double the minimum price of the public lands when sold:"

Act of September 20, 1850, 9 Stat. 466, Sec. 3.

Identical language occurs in these acts of grant:

June 3, 1856, 11 Stat. 20;
June 3, 1856, 11 Stat. 25;
March 3, 1857, 11 Stat. 195;
July 3, 1864, 13 Stat. 365.

The same usage is recognized or adopted in

United States v. S. P. R. R. Co., 200 U. S. 353; Opinion, 29 L. D. 501;
Edwin J. Miller, 35 L. D. 418.

When, now, in legislative language mention was made of $1.25 as the minimum price of agricultural land, or provision was made for disposing of such land at minimum or double minimum price, it certainly never occurred to Congress, or until a few years ago to the Department of the Interior, that the use of that phrase implied that there was any such thing as a possible higher price, or that in any possible circumstances higher prices might be exacted. The phrase was used simply because it was a convenient and commonly accepted expression to signify the price which was the

upset price at auction, and was also at once the minimum, maximum and sole price fixed by law to be paid after the auction.

When, again, Congress, or some committee thereof, came to consider the coal land legislation, it was but natural that the draughtsmen of the statutes should fall into the same mode of expression, which had become established in popular speech and in existing legislation concerning the analogous disposal of public lands in general. Hence, where an auction of such lands, whether agricultural or mineral, is provided for, an upset price is fixed, which is called minimum in price; when private entry is provided for, the same upset price is fixed, and is again called minimum price. In neither situation under either phase of the public land legislation did the mention of a price as the minimum suggest to anybody acquainted with the subject that Congress contemplated a higher price at private entry.

IV.

The error in the Secretary's assumption of authority to fix prices for coal land is further developed by considering the like Departmental action taken under other statutes of like phrasing and effect.

An Act of August 3, 1846, 9 Stat. 51, incorporated into the Revised statutes as section 2455, authorized the Commissioner of the General Land Office to offer for sale isolated or disconnected tracts of public land, the purpose being to dispense with the more formal and cumbrous offering by Presidential proclamation. This enactment was plainly but an amendment to the general statute prescribing the method of selling public lands, the Act of 1820, and it merely engrafted a

new feature of minor importance upon the existing law. The manifest meaning was that, when a tract was by the Commissioner designated for sale, it should be first offered at public auction at an upset price of $1.25 as in other cases of public sales, and that if not sold the land should be subject to private entry at the same minimum price—the whole scheme being identical with the general method of disposal except that the Commissioner's order should take the place of a proclamation.

Under this Act it could hardly be contended that the Commissioner had the power either to fix any other upset price for the auction than that specified in the Act of 1820, or to charge at a subsequent private sale more than $1.25, the minimum and also the sole price for lands offered in the usual way. At any rate, for nearly or quite sixty years it did not occur to the Interior Department or to anyone else that the Act of 1846 authorized any official to name a higher upset price at auction or to charge a higher price at private entry than was fixed for other public lands in like condition; and for the period named isolated and disconnected tracts were sold in accordance with the scheme formulated and the mode prescribed by the Act of 1820.

In the year 1912, however, the Department assumed an authority to ascertain the value of lands sold under section 2455, and to refuse to accept bids at auction or private entries unless the bidder or the entryman would pay a price fixed by official appraisement. And such is the existing practice in cases under that section, being in principle and effect the same practice established in cases of the sale of coal land.

It is submitted that, with respect to the practice under section 2455, the underlying principle is clearly erroneous. It assumes a power and discretion as imported by the Act of 1846 which concededly were not admissible under the Act of 1820, of which the later statute was only an amendment. It was never supposed, and even now no one will pretend, that in the usual course of selling public lands the Commissioner could declare that he would not accept a bid unless it exceeded the statutory minimum, or could refuse to sell at private entry unless the applicant would pay what in the judgment of some appraiser the land was worth. The innovation in these cases is a bold departure from the method prescribed by the general legislation *in pari materia*, which manifestly controls the procedure under section 2455. And that innovation proceeds upon the identical principle adopted in the revolutionary policy concerning coal lands—the assumption that the mention of a minimum price in a statute implies a power in some officer to fix a higher price.

Again, the Act of June 3, 1878, 20 Stat. 29, provided for the entry of lands chiefly valuable for timber or stone "at the minimum price of two dollars and fifty cents per acre."

Of this provision it might be said, as we have said of like language in section 2347, that if the Act of 1878 were the only statute relating to the disposal of public lands, the wording would be ambiguous and would possibly imply a legislative purpose to fix a higher price by some future enactment. As it is, however, the Timber and Stone Land Act is not an isolated piece of legislation, and its meaning becomes clear enough by comparing it with other acts *in pari*

materia, that is, with the pre-existing body of enactments concerning public lands.

In 1878, when the Timber and Stone Land Act was passed, sale for cash was still the prevailing mode of disposing of public land, and was recognized as the usual and normal mode of disposal. The Act of 1820, with its modifications engrafted by the pre-emption Act or 1841, was in active operation, and was perhaps better understood in official quarters than it is now.

Into this existing body of law on the general subject the Act of 1878 was introduced as a special provision to fit a particular case. Although to the extent of its scope it was an innovation, it was by no means an anomaly, but rather the adoption of an established system to a peculiar situation. It was simply an extension of the regular and well known method of cash sales to a class of lands which it was desired to sell more rapidly and at greater convenience to purchasers than was possible under the existing laws.

Accordingly, the Act provided for the entry of timbered lands "which have not been offered at public sale according to law." The manifest reference is to the general law of public land sales and to the statutory practice of offering land first at public auction, after which it is subject to private entry at the minimum or upset price which was fixed for auction sales. Where lands, timbered or other, had been offered, they could be bought at $1.25. This statute provides that lands still unoffered may be bought at private entry, but at a higher price, namely, $2.50.

This price was called the minimum price because, as has been mentioned, the entry price of all offered lands was the minimum price set for auction sale, and in popular and statutory usage the price at private

entry was called the minimum price just as in the coal land acts the prices specified were spoken of as minimum prices in accordance with the same habit of thought and speech engendered by the capital features of the scheme prescribed by the Act of 1820.

The reason for the peculiar phrasing of the Act of 1878 being thus apparent, it is clear that the mention of a minimum price did not import that some official might establish a scale of higher prices for timber lands. Certainly, no one thought so at the time, and for thirty years the statute was administered upon the understanding that the language used fixed the maximum price that could be charged; and this was so notwithstanding a great and growing dissatisfaction on that account which was often vigorously expressed by the officers of the Department.

Finally, in 1908, the then Secretary of the Interior resolved to do what Congress had refused to do and undertook to alter the practical administration of the Act of 1878 so as to make the statute accord with his own conceptions of public policy. Accordingly, it was provided by Departmental regulations that no timber land would be sold at any price until it had been appraised by certain officials, and the land should not then be sold unless the applicant should pay its appraised value.

This apparent disgression from the considerations applicable to the present case seems to counsel justified by the identity of the principle underlying the Departmental innovations in respect of timber lands, of isolated tracts, and of coal lands. It is believed that the nature and drift of the authority assumed in coal land cases will be more amply developed by comparing the

action of the Department in the analogous cases mentioned, and that the argument here submitted gains in clearness and effect by observing the relation of the coal land acts to the other statutes mentioned.

V.

The Departmental assumption of authority to exact for coal lands higher prices than those specified in the statute is at variance with the contemporaneous construction of the statute and with the Departmental practice thereunder as followed for more than thirty years.

The last of the coal land acts was passed on March 3, 1873. On the 15th of the next month the Commissioner of the General Land Office issued a circular for the guidance of the local offices in the administration of the new statute. In this circular it was said:

> "The price per acre is $10 where the land is situated more than fifteen miles from any completed railroad, and $20 per acre when the land is within fifteen miles of such road."
>
> Report of the Commission, 1873.

Later circulars stated the same understanding as to the effect of the enactment in question, and show a consistent practice in conformity therewith extending to the year 1907, a period of thirty-four years from the date of the statute, and of forty-three years from the Act of 1864.

During these periods the Department of the Interior acted upon the understanding that the rates fixed in section 2347 were the maximum prices chargeable, and sold many thousands of acres at prices which were known to have no relevancy to the actual values, at prices which in many instances were known to be ridiculously disproportionate to the values.

This contemporaneous construction of the statute and this long practical interpretation of it, by the officers charged with its administration are of great weight, and if the point is doubtful, should be decisive:

Edwards v. Darby, 12 Wheaton, 207.
Schell v. Fauche, 138 U. S. 562.

In order to sustain the innovation made in coal land cases in 1907, it must be assumed that the Departmental officers of that day understood the intent of Congress better than did their predecessors in 1873, who were contemporaries of the legislators by whom the Act of that year was drawn and enacted.

The Secretary and the Commissioner of 1873, and their advisers, were also more familiar than those of the present day with the Acts of 1864 and 1865, from which the Act of 1873 was derived. When, therefore, the Commissioner in 1873 declared that under the then recent statute the prices of coal land were $10 and $20, it may safely be assumed that he had compared the new enactment with the legislation which it displaced, and thought that the later act did not alter the law as to prices. At any rate, he had before him the very question upon which his successor acted in 1907, whether the mention of a minimum price empowered the Department to fix higher prices. The contemporary Commissioner was of opinion, in the light of precedent legislation, that he had no authority to depart from the law as it had been understood. It cannot be supposed that in so constructing the language of the act he acted unadvisedly; and if that language be really doubtful, the interpretation then put upon it should not be overruled without grave reason and upon clear demonstration of error.

The Act of 1846 was, as has been mentioned, for sixty years understood and administered as a part of the general scheme provided for disposing of public lands. The assertion of a power to appraise isolated tracts is a repudiation of contemporary construction and long established practice.

The Act of 1878, while pending as a bill, was strongly disapproved by the then Commissioner and Secretary, and principally upon the ground that it limited the price of timber land to $2.50 per acre. In the Secretary's report for 1878, at p. 15, he quotes the Commissioner thus:

> "The price fixed is too low as much of the land is worth from five to fifty dollars per acre."

So late as 1898, Commissioner Hermann recommends the repeal of the Timber and Stone Land Act, saying:

> "The Act of 1878..... affords a ready cover for the acquirement of most valuable timber... by payment of $2.50 per acre."
>
> Commissioner's Report, 1898, p. 101.

Again in 1902, Mr. Hermann, and in 1905 Commissioner Richards, report in the same way:

> Report for 1902, p. 77;
> Report for 1905, p. 75;

Before the Act of 1878 was passed, Congress was apprised that the Department understood it to mean that the so-called minimum price named in the act was the maximum price to be charged. Afterwards, Congress was solemnly and repeatedly advised that the limitation of price fixed by Departmental construction was unsound in policy and pernicious in practice. Yet for thirty years Congress sat by and suffered this construction of the statute, with all its alleged detrimental

consequences, to stand unchanged. The situation seems quite completely within the doctrine laid down in United States v. Midwest Oil Co., 236 U. S. 459.

The theory that the price of the lands should or may be made to conform to their intrinsic value is at variance with the purpose of the statute.

In the case of the Trinidad Coal & Coking Co. v. United States, 137 U. S. 160, Mr. Justice Harlan, speaking for this Court, said:

> "In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and associations of persons at prices below their actual value."

The opinion in the case cited was promulgated in 1890, and was presumably at once made known to Congress. If that body disapproved the purpose imputed to it, nothing was ever done, or has been done, to express the disagreement of the legislature. On the contrary, the Department was permitted to proceed for seventeen years longer upon the principle enunciated by this Court as applicable to coal land legislation.

And even at the end of that period Congress had done done nothing in the way of dissent from the opinion, and it was left to the Department itself to discover that both this Court and successive administrators for forty years had misapprehended the intent and effect of the statute.

VI.

If the Secretary has power to fix other prices than those named in the statute, he has power to prevent the operation of the statute.

If section 2347 does not limit the prices of coal lands, there is no limit anywhere. No other act fixes any maximum, nor does this section or any other statute prescribe any principle with respect to which prices shall be regulated, or provide for a scale of prices having reference to any conditions, circumstances or contingencies by which prices shall be raised or lowered. It is not laid down, or even hinted, that the value of the land must or may be considered in fixing the price. Nor is any mode or method made obligatory as the means of determining either the value or the price of land. Unless, therefore, the price is fixed by the statute, it must be ascertained by the mere discretion of the person who at the time happens to be Secretary of the Interior.

If the Secretary has any authority at all in the matter, it is absolute authority, unlimited both as to the manner and extent of its exercise. He may charge what prices he chooses, and he may choose in any manner and upon any considerations which seem good or agreeable to himself—no law putting any restraint upon his action.

Which is to say that the authority may be used to control the sale of coal land according to the Secre-

tary's discretion. And also to say that the sale of coal land may be stopped altogether if, for any reason, the Secretary considers that to be judicious or desirable.

It is true that the presently accepted policy of dealing with coal lands professes to proceed upon the postulate that the prices shall be proportionate to the values of the lands. Hence we have in practice a method of appraisement by which value is ascertained and the price is fixed accordingly. It may be assumed that, as things are now going, the Government gets approximately the intrinsic or the commercial value of the lands sold.

But that is so only because the Secretary for the time being chooses to have it so. It is not because anything in the statute requires that the lands shall be sold for their intrinsic value, or for their commercial value, or for their appraised value, or that the price shall be fixed with any regard at all for any kind of value.

Indeed, we have been told by this Court in the case of the Trinidad Company, *supra*, that Congress in the enactment of this statute took no thought of obtaining an equivalent for the lands sold. Some Secretaries in the past, for a period of thirty or forty years, agreed with Congress in its conception of policy, and have been content to let coal lands go at the statutory prices. Later Secretaries have entertained other conceptions of policy and have read those conceptions into the statute. But that is a matter of individual judgment or individual conscience. The act itself does not prescribe that there shall be any relation between the value of the land and the prices charged.

The present Secretary, it seems, thinks it judicious to sell coal land at its real value, and he considers appraisement a satisfactory means of ascertaining values. But tomorrow he may think otherwise on either or

both points, or his successor may. Either officer or any future Secretary may discard appraisement because he thinks it does not fairly determine the value of the lands. So any Secretary may discard appraisement because he considers that the value of the lands has nothing to do with the prices to be charged. And any Secretary may come to the opinion that it is not judicious to sell coal land at any price. In that case there is no occasion for appraisement or any other method of determining values. If it is sufficient to fix an arbitrary price so high that no one can afford to buy.

The Secretary then, upon this construction of the statute, is vested with a veto power which may prevent the operation of the statute. He may at any time and upon any consideration satisfactory to himself promulgate a scale of prices which will make it impossible for anybody to purchase. He may believe that good policy dictates conservation of coal lands for coming generations, or holding such lands until the exhaustion of existing mines will enable the Government to command higher prices, or that the mining industry will be benefited by preventing an increase of mines; infinitude of reasons, theories, and motives—political, economic, sound or unsound, virtuous or corrupt—may operate upon any future Secretary either to stimulate the sale of coal lands by fixing moderate prices or to stop such sales by imposing impossible prices.

Certainly, Congress never contemplated that the operation of the statute should depend upon the judgment, discretion, doctrines, interest, or caprice of each of an indefinite succession of the unidentified and some yet unborn persons who may in the next century occupy the office of Secretary of the Interior. Yet that is the necessary result if section 2347 leaves the price

of coal lands to be fixed by the Secretary for the moment without limitation upon his action.

Moreover, if the effect of the statute were to clothe the Secretary with power to prescribe prices according to his own discretion, the provision would be manifestly unconstitutional. To enact that an act adopted by the legislature shall be in effect so long as it is approved by an executive officer and shall cease to be law when such officer so decrees, would be a palpable delegation of legislative power.

No doubt a statute may be so drawn as to operate or not to operate upon certain contingencies or in certain conditions of fact to be ascertained by some executive officer. Such was the legislation approved in Field v. Clark, 143 U. S. 649, where the distinction is drawn between a statute effective in a certain state of facts, the existence of which is determined by an individual, and a statute which is to be effective or not accordingly as an individual shall see fit.

The construction put upon section 2347 by the Court of Claims brings the enactment within the latter class. The prices to be charged are not to depend upon any defined contingency or condition, such as the value of the land or the state of the market or the vicissitudes of the coal mining industry. If the Secretary chooses to regulate his charges with reference to such matters, he may do so; but is also at equal liberty to act with reference to the changes of the moon or the state of his digestion. He is not bound to ascertain anything except his own personal opinions, and he is not bound to act even upon those when ascertained. If any particular Secretary deems it his duty to fix prices with regard to values, he does so, not because the act makes

it his duty to do so, but purely because his individual conscience so suggests. Another Secretary may deem it his duty or find it agreeable, to ascertain some other fact than value; and he is equally at liberty to let the statute operate or not according to his opinion concerning the other fact ascertained. In this way the price of coal lands may be determined by tossing a coin or consulting a clairvoyant.

It is accordingly submitted that the judgment appealed from should be reversed, and the case remanded to the Court of Claims with instruction to enter judgment for the claimant.

CHARLES A. KEIGWIN,
WILLIAM R. ANDREWS,
Attorneys for the Appellant.